2011 IL App (1st) 101924-U

FIFTH DIVISION
December 30, 2011

No. 1-10-1924

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 13389
	)	
AXEL GARCIA,	)	Honorable
	)	John J. Moran, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court.
Presiding Justice Epstein and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held:* Judgment entered on defendant's conviction of armed habitual criminal affirmed over his claims that his sentence is excessive, and that his conviction under the armed habitual criminal statute violates the *ex post facto* clauses of the Illinois and federal constitutions.

¶ 2 Following a bench trial, defendant Axel Garcia was found guilty of multiple weapons offenses, then sentenced to 20 years' imprisonment for the offense of armed habitual criminal. On appeal, defendant contends that his sentence is excessive in light of certain mitigating factors, and that his conviction of armed habitual criminal violates the *ex post facto* clauses of the Illinois and federal constitutions.

¶ 3 The evidence adduced at trial shows, in relevant part, that about 1:12 a.m. on July 11, 2009, Chicago police officers Pierri and Steiner were responding to a call of a gang disturbance in the "gang infested" area of Kenneth and Belden Avenues, in Chicago, when Officer Pierri observed defendant on the sidewalk in front of a two-flat frame building at 2243 North Kenneth Avenue. Defendant looked in the officers' direction, then entered the front yard where four other individuals were standing. When the officers stopped their car and got out to conduct a field interview with him, defendant turned around and quickly headed towards the stairs of the building, then ran up to the front porch with Officer Pierri in pursuit saying, "Stop, police."

¶ 4 As defendant was running up the stairs, he took a white t-shirt off his shoulders, leaned back, and pulled an object out from his waistband which he wrapped inside the t-shirt. He then entered the foyer of the building and placed the t-shirt inside a yellow bag containing rock salt which was situated to the left of the door, and started to climb a staircase leading to the second floor. Officer Pierri pursued him, and defendant finally stopped near the top of the stairs and leaned up against the wall as a lady came out and said, "Don't bring that shit in here." Officer Pierri conducted a protective pat-down of defendant and called down to his partner in the foyer to check the bag of rock salt, inside of which he found a .22 caliber handgun loaded with nine live rounds.

¶ 5 The evidence further showed that the area of Kenneth and Belden Avenues is Maniac Latin Disciples territory, and at the time of this incident, there was a conflict between that gang, the Eagles two blocks to their south, and the Spanish Cobras one to two blocks east of the former. When the officers subsequently asked defendant why he had the gun, he responded that "the Cobras and Eagles keep driving through." The State then introduced into evidence, certified copies of defendant's 2005 conviction for aggravated unlawful use of a weapon (AUUW) (04 CR 29515-01) and 2007 conviction for unlawful use of a weapon by a felon (UUW) (06 CR 20462).

The court ultimately found defendant guilty on all counts (armed habitual criminal, two counts of UUW, and eight counts of AUUW).

¶ 6 At sentencing, counsel noted in mitigation that defendant's parents were present in court, that he enjoyed "very good family support" which he would continue to receive after his release from custody, and that no injuries occurred during the commission of the offense. The State argued in aggravation, *inter alia*, that defendant was an unemployed high school drop out whose parents were working to support him so that he could enjoy, quoting from the presentence investigation report (PSI), "partying and gang banging with his friends." The State also asserted that "[t]he Armed Habitual Criminal Statute could have been written with this defendant in mind," noting his current and prior gun convictions.

¶ 7 Before announcing its sentencing decision, the trial court stated that it had considered the nature, circumstances, and seriousness of the offense, the evidence presented at trial and at the sentencing hearing, defendant's PSI, the arguments of counsel, and the statutory factors in aggravation and mitigation. The court then sentenced defendant to 20 years' imprisonment for the offense of armed habitual criminal.

¶ 8 In this appeal from that judgment, defendant first contends that the 20-year sentence was excessive, pointing out that no one was injured or threatened during the commission of the offense, that he has "considerable rehabilitative potential," that he has never received a sentence greater than four years' imprisonment, and that the trial court did not give a reason for sentencing him 14 years above the minimum sentence. The State responds that the 20-year sentence imposed by the trial court was warranted where defendant habitually violated gun laws, and demonstrated an unwillingness to reform and an inability to be rehabilitated, and that a lengthy sentence was required for the protection of society due to the gang-related nature of the offense.

¶ 9 It is well-settled that a reviewing court will not disturb the sentence imposed by the trial court absent an abuse of discretion. *People v. Cabrera*, 116 Ill. 2d 474, 494 (1987). Where, as here, the sentence falls within the prescribed statutory limits, it will not be disturbed unless it is greatly at variance with the purpose and spirit of the law or is manifestly disproportionate to the offense. *Cabrera*, 116 Ill. 2d at 493-94. A sentence will not be found disproportionate where it is commensurate with the seriousness of the crime, and adequate consideration was given to any relevant mitigating circumstances, including the rehabilitative potential of defendant. *People v. Perez*, 108 Ill. 2d 70, 93 (1985).

¶ 10 Defendant maintains that the sentence imposed by the trial court in this case was arbitrary and excessive, citing "significant mitigating evidence," and asserting that the nature of the offense did not justify such excessive punishment. Notwithstanding the dubious characterization of the mitigating evidence in this case as "significant," the record affirmatively shows that the court considered this evidence when it imposed the sentence. In requesting a reduction in sentence, defendant is essentially asking this court to re-balance the appropriate factors and independently conclude that his sentence is excessive, which is not our function. *People v. Burke*, 164 Ill. App. 3d 889, 902 (1987), citing *People v. Cox*, 82 Ill. 2d 268, 280 (1980).

¶ 11 The offense of armed habitual criminal is a Class X felony (720 ILCS 5/24-1.7(b) (West 2008)) with a sentencing range of 6 to 30 years' imprisonment (730 ILCS 5/5-4.5-25(a) (West 2008)). The 20-year sentence imposed by the trial court fell within that range, and considering the gang-related circumstances of the crime, and the low rehabilitative potential of defendant as evidenced by his proclivity toward elicit gun usage, that sentence was not disproportionate to the offense committed or at variance with the spirit and purpose of the armed habitual criminal statute. *Cabrera*, 116 Ill. 2d at 493-94. In addition, the record shows that the trial court considered the appropriate sentencing factors, including the mitigating factors argued here, in

fashioning defendant's sentence. Under these circumstances, we find no abuse of sentencing discretion to permit any modification by this court (*People v. Almo*, 108 Ill. 2d 54, 70 (1985)), and therefore affirm the sentence imposed.

¶ 12 Defendant next contends that his armed habitual criminal conviction violates the *ex post facto* clauses of the Illinois and federal constitutions. Our review of the constitutionality of a statute is *de novo*. *People v. Carpenter*, 228 Ill. 2d 250, 267 (2008).

¶ 13 A person is guilty of being an armed habitual criminal if he possesses a firearm after having previously been convicted twice or more of UUW or AUUW. 720 ILCS 5/24-1.7(a)(2) (West 2008). Here, defendant was found guilty of unlawful possession of a firearm, and the State proved that he had a 2005 AUUW conviction and a 2007 UUW conviction, thus proving him guilty beyond a reasonable doubt of the offense of armed habitual criminal.

¶ 14 Defendant, nonetheless, maintains that his armed habitual criminal conviction violates the proscription against *ex post facto* legislation because it is predicated, in part, on his 2005 AUUW conviction which occurred prior to the effective date of the armed habitual criminal statute in Public Act 94-398 (eff. Aug. 2, 2005) (adding 720 ILCS 5/24-1.7). The State responds that Illinois courts have repeatedly affirmed the constitutionality of the armed habitual criminal statute over identical challenges and urges this court to follow those "well-reasoned decisions" and deny defendant's *ex post facto* challenge.

¶ 15 The State correctly observes that the same argument raised by defendant in this case was made and rejected in *People v. Leonard*, 391 Ill. App. 3d 926, 931 (2009), and that this court found the reasoning therein compelling and adopted it in *People v. Bailey*, 396 Ill. App. 3d 459, 464 (2009). In these cases, it was found, contrary to defendant's claim, that the armed habitual criminal statute does not violate constitutional prohibitions against *ex post facto* legislation because it punishes defendant for the new and separate offense of possessing a firearm while

having already been convicted of two prior enumerated felonies, and, as such, provides fair warning of the offense. *Bailey*, 396 Ill. App. 3d at 464; Leonard, 391 Ill. App. 3d at 931-32.

¶ 16 Here, defendant was convicted under the armed habitual criminal statute for possessing a firearm in 2009, after he had previously been convicted of two qualifying offenses in 2005 and 2007. Defendant thus had fair warning that when he possessed a firearm in 2009, after being convicted of these two qualifying offenses, he was committing the new offense of armed habitual criminal. *People v. Tolentino*, 409 Ill. App. 3d 598, 608 (2011), and cases cited therein.

¶ 17 In reaching that conclusion, we find defendant's reliance on *People v. Levin*, 157 Ill. 2d 138 (1993) and *People v. Dunigan*, 165 Ill. 2d 235 (1995) misplaced. In *Levin*, 157 Ill. 2d at 142, the supreme court addressed a double jeopardy challenge to enhanced sentencing proceedings. In *Dunigan*, 165 Ill. 2d at 239, the supreme court addressed multiple constitutional challenges to the Habitual Criminal Act. Those cases concerned a habitual criminal statute that was a sentencing enhancement, and addressed defendants' constitutional claims within that particular context, while the armed habitual criminal statute at issue here is a substantive offense which clearly punishes defendant for the new offense of possessing a firearm and not for his earlier convictions. *Bailey*, 396 Ill. App. 3d at 464; *Leonard*, 391 Ill. App. 3d at 932. Moreover, the supreme court did not state in *Levin* and *Dunigan* that habitual criminal legislation cannot include prior convictions as elements of an offense. *Bailey*, 396 Ill. App. 3d at 464; *Leonard*, 391 Ill. App. 3d at 932.

¶ 18 On the facts presented, we find no reason to depart from the well-reasoned decisions in *Leonard* and *Bailey*, and conclude that defendant's armed habitual criminal conviction does not violate the proscriptions against *ex post facto* legislation. Accord *Tolentino*, 409 Ill. App. 3d at 608; *People v. Coleman*, 409 Ill. App. 3d 869, 880 (2011); *People v. Davis*, 408 Ill. App. 3d 747, 752 (2011).

¶ 19 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.